

Supreme Court, U. S.
FILED

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MICHAEL RODAX, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1976

No., **76-3931**

RICHARD J. O'CONNOR,

Petitioner,

v.

THE STATE TAX COMMISSION OF
THE STATE OF NEW YORK,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE
OF NEW YORK**

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IN THE Supreme Court of the United States

October Term, 1976

No.

RICHARD J. O'CONNOR,

Petitioner.

v.

THE STATE TAX COMMISSION OF THE
STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner respectfully prays that a Writ of Certiorari issue to review the Order of the New York State Court of Appeals entered in this case on June 17, 1976; or alternatively, the Court of Appeals having refused to hear this case, that said Writ issue to the New York State Supreme Court, Appellate Division, Third Department, being the highest Court of the State in which a decision could be had pursuant to 28 USCA 1257 (3), upon which this Court's possible jurisdiction is based.

Opinions Below

The Order of the New York State Court of Appeals denying Petitioner's motion to vacate its Order dismissing Petitioner's appeal is appended at Appendix A, p. 1a.

The New York Court of Appeals' Order of Dismissal of Petitioner's appeal is appended at Appendix B, pp. 2a, 3a.

The opinion of the New York Supreme Court, Appellate Division, Third Department, is appended at Appendix C, pp. 3a, 4a.

The opinion of the New York Supreme Court, Special Term, is appended at Appendix D, pp. 5a-7a.

The opinion of the New York State Tax Commission is appended at Appendix E, pp. 8a-11a.

Federal Jurisdiction

This appeal is brought by Writ of Certiorari pursuant to 28 USCA 1257 (3) and Article 3, Sec. 2, Clause 1 of the U. S. Constitution where the validity of a State Statute is drawn in question.

The issue raised in this case is whether or not the professional exemption to the New York State Unincorporated Business Tax as contained in Sec. 703 (c) of the New York State Tax Law and as implemented by Reg. 203.11 of the New York State Tax Commission is unconstitutional as a denial of due process and the equal protection of the law under the Fourteenth Amendment to the U. S. Constitution.

Question Presented

The exclusion of Petitioner by the Respondent from the professional exemption to the New York State Unincorporated Business Tax is arbitrary and unfair discrimination without due process of law and a denial of the equal protection of the law.

Statutes and Regulations Involved

This case involves Section 703 (c) of the New York Tax Law which prescribes an exemption to the New York Unincorporated Business Tax and can be found at p. 421 of 59 *McKinney's Consolidated Laws of N. Y. Annotated* and reads as follows:

"(c) Professions.—The practice of law, medicine, dentistry or architecture, and the practice of any other profession in which capital is not a material income producing factor and in which more than eighty per centum of the unincorporated business gross income for the taxable year is derived from personal services actually rendered by the individual or the members of the partnership or other entity, shall not be deemed an unincorporated business."

Also involved in this case is Regulation 203.11 (b) (1) of the New York State Tax Commission, 20 NYCCR Section 203.11 (b) (1), the provisions of which are set out at Appendix F, pp. 12a-14a.

Petitioner's constitutional challenge is that his exclusion from the exemption and the inclusion of attorneys and other professions is discriminatory and a denial of due process and the equal protection of the law under the Fourteenth Amendment to the United States Constitution.

Statement of Facts

1. Petitioner is a duly licensed "independent adjuster" of insurance claims for insurance carriers pursuant to Section 123 of the New York State Insurance Law.

2. He timely filed his personal income tax returns for the years 1967-1970 inclusive. The Respondent has assessed unincorporated business tax deficiencies for the years in question totalling \$3,786.82.

3. Capital is not a material income producing factor and all of his income is derived from personal services.

4. Petitioner has an office in his home for record keeping only, does not advertise and has no employees but does utilize a trade name "Chautauqua Claims Service" which appears on his stationery.

5. Petitioner has timely filed the required surety bond of \$1,000 annually and paid the required \$25.00 license fee, as an Independent Adjuster. A copy of the required surety bond and application for a license are a part of the record in this case. From 1949-62, Petitioner was employed by insurance companies as an adjuster and became licensed as an Independent Adjuster in 1962.

6. Petitioner seeks to render his opinions to insurance carriers in an objective manner. Upon receipt of an assignment, he will talk to the insured, to various claimants and to witnesses. Based on his findings, Petitioner gives a factual appraisal of the situation and an opinion as to the carrier's liability. He also appears in behalf of the insurers at Workmen's Compensation hearings.

7. Petitioner has attended the University of Buffalo for 2-1/2 years and has taken night courses. He does not have a Bachelors Degree from any college or university.

8. Petitioner is a member of his local claimsmen's association and is subject to adhering to principles and rules of conduct, a copy of which are a part of the record.

9. Professional liability insurance is available to independent adjusters, a copy of a typical insurance policy being a part of the record.

Timeliness of Raising Federal Question in the Proceedings Below

Throughout this proceeding, commencing with its initial thirty day protest to the Unincorporated Business Tax assessment by the Respondent and which protest was dated September 20, 1972, Petitioner has consistently and timely raised his constitutional objections to his being excluded from the professional exemption. Petitioner further explicitly raised his objections in his opening statement and in his summation at the formal hearing before Respondent's examiner held on November 15, 1973.

The specificity of Petitioner's constitutional objections are recited in the opinion of the State Tax Examiner found in Appendix E of this Petition at pp. 8a-11a.

On the Petitioner's constitutional objections, the State Tax Examiner concluded that his Commission was without jurisdiction to declare a statute unconstitutional and stated his belief that the statute was constitutional.

The constitutional objections were further raised before the Special Term of the New York Supreme Court, but were implicitly rejected in the Court's final decision in the case as appears in Appendix D of this Petition at pp. 5a-7a.

On appeal, the same constitutional objections were raised before the New York Supreme Court, Appellate Division Third Department, and were specifically denied by the Court as appears in its opinion found in Appendix C of this Petition at pp. 3a, 4a.

On further appeal and re-argument before the New York Court of Appeals, Petitioner raised the same constitutional questions, but was unsuccessful in seeking to have the Court hear the case. Initially, the Court acting *sue sponte*, by letter

of its Clerk dated January 9, 1976, had agreed to hear the case based upon a letter from Petitioner's counsel dated January 6, 1976 setting forth Petitioner's constitutional objections, both of which letters appear in Appendix G, pp. 15a-22a of this Petition.

Reasons for Granting the Writ

Petitioner contends that the professional exemption as construed by the respondent in its regulations is unconstitutional on the grounds of arbitrary and unfair discrimination in favor of attorneys and other professionals without due process of law and in denial of the equal protection of the laws to Petitioner, an independent insurance adjuster.

An examination of the pertinent New York case law and available published materials illustrates that the professional exemption here in issue was enacted by the New York State Legislature simply because professionals could not then incorporate and thereby avoid the Unincorporated Business Tax at 4-1/2% which was intended to be slightly under the State's then existing 6% Corporation Tax. It was felt that the greater advantages of doing business in the corporate form justified the higher corporate rate (See Appendix H, pp. 23a, 24a containing excerpts of New York Governor Herbert Lehman's Message to the State Legislature in 1935; and Appendix I, pp. 25a, 26a, containing further comment on the legislation).

The New York State Court of Appeals addressed itself to this question in the leading case of *People ex rel. Tower et al. v. State Tax Commission*, 282 NY 407, 408 (1940) as follows:

"... the Legislature chose to exempt the professions of the law, medicine, dentistry and architecture for the express reason that under existing law, they cannot be conducted under corporate structure . . ."

Respondent agreed through its legal counsel in its own Tax Bulletin, 1968 NYTB, v. 1, pages 57-8, issued January 1, 1969:

"The reason why the legislature provided that the practice of law, medicine and other professions shall not be subject to the Unincorporated Business Tax was that corporations cannot practice these professions, so that individuals who do practice them are not in competition with corporations which are required to pay a corporation franchise tax."

By Article 15 of the Business Corporation Law enacted May 19, 1970, (6 *McKinney's Consolidated Laws of New York Annotated*, p. 53 of Supplement) the state-wide barrier to professionals incorporating was removed. In so doing, petitioner contends that the continuation of the professional exemption under Sec. 703 (c) of the New York Business Corporation Law at the same time that respondent assesses the tax to petitioner is unfair discrimination without due process of law against the petitioner and a denial to him of the equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution.

Consistently the Courts have inquired into the intent of the legislature in interpreting statutes. The Courts have recognized that the basis for tax exemptions must

"... rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification as to be wholly arbitrary" (Justice Jackson).

Walters v. St. Louis, 347 U.S. 231, 98 L. ed. 660, 665; 74 Set 505 (1954).

In this case, the purpose for the original professional exemption has been eliminated. To sustain the continuing

validity of the professional exemption and its presumed constitutionality is to require a judicial broadening of the classification from what has been previously stated as the intent of the Legislature. By leaving to the Courts and to the respondent the determination of what constitutes an "other profession" under Section 703 (c), the Legislature has allowed for varying interpretations. Without such a broadening interpretation to include Petitioner, the respondent's cited regulation 203.11 at Appendix G, pp. 15a-22a fails constitutionally for both due process and equal protection reasons in discriminating arbitrarily in favor of certain professionals such as attorneys and against petitioner.

The continued insistence by respondent and exclusion of petitioner from the professional exemption even in the face of the incorporation rights of professionals such as now exists leads to petitioner's conclusion that what must have been intended by the Legislature in the professional exemption was to exempt those categories who in practical fact "would" not incorporate as opposed to those who "could" not incorporate. Petitioner, like most attorneys, is so situated that he would not incorporate. The primary reason for this is that he basically has nothing transferrable by sale or inheritance because his services are personal in nature. Therefore, there are no corporate advantages in perpetual existence and ready transferability of shares of stock.

The personal service standards contained in the statute do require that success in any of the enumerated professions as well as that of petitioner is a matter of talent and individual characteristics. As stated above, whatever value there is to a law practice or to petitioner's claim service at death is of little or no value and is not transferrable. This is generally true of all businesses where capital is not a material income

producing factor and income is derived exclusively from personal services. (*Estate of Arthur J. Brandt*, 8TCM 820, P-H TC memo 49, 226, page 728 [1949]).

It is significant to note that the New York licensing statute applicable to petitioner specifically excludes attorneys from compliance with its terms at Section 123 (6)(c) of the Insurance Law.

"6. Nothing contained in this section, and applicable to independent adjusters, shall apply to: (c) any licensed attorney at law of this State." (27 *McKinney's Consolidated Laws of N.Y. Annotated*, p. 307.)

This is at the heart of petitioner's case. All of petitioner's work is done by attorneys.

The recent case decided by the New York Court of Appeals in *Matter of Koner v. Procaccino et al.*, (39 NY 2d 258, 383 NYS 2d 295, decided April 1, 1976) is illustrative of the arbitrariness to which the professional exemption and its interpretive regulation are subject. This case held that self-employed photographers are not to be treated equally to artists and musicians which are recognized (*Voorhes v. Bates*, 308 N.Y. 184 [1954]) as being exempt from the tax—the *Voorhes* case establishing that neither professional licensing nor advanced degrees were required for the exemption (See the dissent of Justice Fuchsberg in the *Koner* case at 383 N.Y. 2d 295, 299). Industrial designers have also been found to be exempt (*Matter of Teague v. Gray*, 261 AD 652, affirmed 287 NY 549 [1941]). A landscape architect without a graduate degree has similarly been found entitled to the exemption (*Matter of Geiffert v. Mealey*, 293 N.Y. 583 [1944]).

The removal of the barrier of incorporation combined with the various Court interpretations that do not require any

professional license or advanced degree result in a maze on contradiction and often tortuous reasoning by the Courts in order to sustain the exemption. This Court should either void the exemption without further delay or to sustain it constitutionally should include this petitioner within it.

To further confuse the situation, the continuation of the State-wide professional exemption is now in direct contrast to the situation of professionals in conducting their business in New York City. In 1966, Chapter 772 of the Laws of the State of New York was enacted "to enable any city having a population of one million or more to raise tax revenue by authorizing the imposition of taxes . . . on unincorporated businesses." Specifically excluded from such definition was the same professional exemption which is still contained in the state-wide law (*McKinney's 1966 Session Laws of New York, Chapter 772, page 941 and Sec. 103 of City Unincorporated Business Income Tax at page 1061*).

Pursuant to Chapter 772, New York City enacted its City Unincorporated Business Tax making it applicable to income beginning with the calendar year 1966 and adopting the language of Chapter 772 to define the tax and exemptions therefrom.

On June 9, 1971, Chapter 412 of the Laws of the State of New York was enacted to allow New York City to repeal the professional exemption. New York City followed Chapter 412 with the enactment of its own local law No. 36 and adopted the language of the Legislature (*McKinney's 1971 Session Laws of New York, Chapter 412, pages 594-595*).

Many New York cases followed raising the issue of whether or not the repeal of the professional exemption by the State Legislature was unconstitutional. One of these cases was

Shapiro v. City of New York, 67 Misc. 2d 1021; affirmed 32 NY 2d 96 (1973). Upon review of the Court's opinion, it appears that respondent very likely used this Petitioner's same argument to justify the repeal of the professional exemption at 325 NYS 2d 787, 791:

"This Court will not determine plaintiff's application on the narrow ground that since members of the professions may now incorporate the repeal of the exemption may not be assailed."

Moreover, the United States Supreme Court has seen fit to refuse to grant a special exemption to the learned professions from the restraint of trade provisions in Section 1 of the Sherman Anti-trust Act. 15 U.S.C. 1. Accordingly, attorneys' minimum fee schedules were found to be illegal in restraint of trade and commerce under the federal Sherman Anti-trust Act. (*Louis H. Goldfarb et ux. v. Virginia State Bar Association*, . . . U.S. . . ., 44 L.ed. 2d 572, 95 S.Ct. . . . 1975).

Among the alternative remedies presented to this Court could very well be a holding of the professional exemption to be unconstitutional, leaving the balance of the tax law in effect and allowing to petitioner his claim of not being liable for tax to date, but decreeing that hereafter petitioner and all persons similarly situated, including all professionals previously exempted should be liable for the tax. By such an order, no mass refunds need be allowed for other taxpayers on the grounds of public policy involved in the substantial reliance by government on such revenues for budgetary purposes. Such a restricted remedy has been followed in criminal cases before the United States Supreme Court which raised the issue of retroactive application of a statute held unconstitutional (*See Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030, 22 L ed. 248 [1969]).

The injustice benefitting professionals, including attorneys, in our basically classless society would thereby be removed by the legal system itself at a time when the public is often reckless in its criticism of the legal system and the many excellent judges and lawyers forming its backbone. This extra judicial consideration is described for background purposes only and is relevant on the issue of the retrospective application of the unconstitutional statute as discussed by the U. S. Supreme Court in the *Desist* case cited above.

Conclusion

For the reasons stated above, this Petition for Certiorari should be granted.

Respectfully submitted,

H. JAMES ABDELLA,
Johnson, Peterson, Tener
& Anderson,
Bankers Trust Building,
Jamestown, New York 14701,
(Attorneys for Petitioner).

APPENDIX A

Opinion and Order of New York State Court of Appeals, Motion No. 612, Decided June 17, 1976

STATE OF NEW YORK COURT OF APPEALS

Mr. Zolezzi

At a session of the Court, held at Court of Appeals Hall in the
City of Albany on the seventeenth day of June A. D. 1976.

Present, HON. CHARLES D. BREITEL,
Chief Judge, presiding.

Mo. No. 612

In the Matter
of
the Application of RICHARD J. O'CONNOR,
Appellant,
vs.

THE STATE TAX COMMISSION OF THE STATE
OF NEW YORK,

Respondent.

A motion for reargument of a motion to dismiss the appeal in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

JOSEPH W. BELLACOSA,
Joseph W. Bellacosa,
Clerk of the Court.

APPENDIX B

**Opinion and Order of New York State Court
of Appeals, Motion No. 64, Decided
February 19, 1976**

**STATE OF NEW YORK
COURT OF APPEALS**

At a session of the Court, held at Court of Appeals Hall in the
City of Albany on the nineteenth day of February A.D.
1976.

Present, HON. CHARLES D. BREITEL,
Chief Judge, presiding.

Mo. No. 64

In the Matter
of
the Application of RICHARD J. O'CONNOR,
Appellant,
vs.

THE STATE TAX COMMISSION OF THE STATE
OF NEW YORK,
Respondent.

A motion having heretofore been made herein upon the
part of the respondent to dismiss the appeal taken by the ap-
pellant in the above cause to this Court and papers having
been submitted thereon and due deliberation having been
thereupon had, it is

*Appendix C—Opinion of New York Supreme
Court Appellate Division.*

ORDERED, that the said motion be and the same hereby is
granted and the appeal dismissed, without costs, upon the
ground that no substantial constitutional question is directly
involved.

(Seal) JOSEPH W. BELLACOSA,
Joseph Bellacosa,
Clerk of the Court.

APPENDIX C

**Opinion of New York Supreme Court Appellate
Division, Third Department, Docket No.
26082, Decided November 20, 1975**

SUPREME COURT
Appellate Division—Third Judicial Department
November 20, 1975 26082

In the Matter
of
RICHARD J. O'CONNOR,
Appellant,
v.
STATE TAX COMMISSION,
Respondent.

Appeal from a judgment of the Supreme Court at Special
Term, entered January 28, 1975 in Albany County, which dis-

*Appendix C—Opinion of New York Supreme
Court Appellate Division.*

missed petitioner's application, in a proceeding pursuant to CPLR article 78, and confirmed a determination of the State Tax Commission sustaining unincorporated business tax assessments imposed under article 23 of the Tax Law.

We agree with the court's decision confirming the determination of the respondent that the services rendered by petitioner as an independent claims adjuster do not entitle him to a professional exemption under subdivision (c) of section 703 of the Tax Law (*People ex rel. Tower v. State Tax Commission*, 282 N.Y. 407; *Matter of Koner v. Procaccino*, 45 A D 2d 551; *Matter of Rosenbloom v. State Tax Comm.*, 44 A D 2d 69). On this record, such a finding is not arbitrary or capricious. We find no merit in petitioner's assertions that there is any constitutional violation in the statutory exemption or its application (see *Shapiro v. City of New York*, 32 N Y 2d 96; *People ex rel. Moffet v. Bates*, 276 App. Div. 38).

Judgment affirmed, without costs.

GREENBLOTT, J. P., SWEENEY, KOREMAN, MAIN
and REYNOLDS, JJ., concur.

APPENDIX D

**Opinion of Special Term of New York Supreme
Court, Third Department, Decided
January 15, 1975**

STATE OF NEW YORK

SUPREME COURT—County of Albany

In the Matter
of

the Application of RICHARD J. O'CONNOR,
Petitioner,

against

THE STATE TAX COMMISSION OF THE STATE
OF NEW YORK,

Respondent.

To review a determination made after a hearing in the matter of Unincorporated Business Taxes Under Article 23 of the Tax Law for the years 1967, 1968, 1969 and 1970.

(Supreme Court, Special Term, Albany County,
December 13, 1974)

(Justice John T. Casey, Presiding)

Appearances:

Johnson, Peterson, Tener & Anderson, Esqs., H. James Abdella, Esq., Of Counsel, Attorneys for Petitioner, Bankers Trust Building, Jamestown, New York 14701.

Hon. Louis J. Lefkowitz, Attorney General, Attorney for Respondent, Thomas P. Zolezzi, Esq., Of Counsel, The Capitol, Albany, New York 12224.

Appendix D—Opinion of Special Term of
New York Supreme Court.

MEMORANDUM.

CASEY, J.

This is a proceeding pursuant to Article 78 of the CPLR to review a determination of the State Tax Commission, which sustained unincorporated business tax assessments imposed under Article 23 of the Tax Law.

The petitioner was assessed unincorporated business tax liability upon income derived from his activities as an independent claims adjuster. The facts as developed in a formal hearing before a hearing officer designated by the State Tax Commission are undisputed.

The petitioner is a high school graduate and attended the University of Buffalo for two and one-half years. Subsequently, he took all the insurance night courses at the Millard Fillmore College at the University of Buffalo and various correspondence courses through New Amsterdam Casualty Company. From 1949 to 1962 he was adjuster. In 1962, the petitioner obtained an independent adjuster's license from the New York State Department of Insurance. As an independent adjuster he would be contacted by an insurance agency and given an assignment. Upon receipt of the assignment, he would contact the insured and obtain a statement from him; petitioner would also contact various witnesses. Upon completion of those procedures, the petitioner would issue a written report to the insurance carrier stating his opinion as to the liability of the carrier.

The issue presented is one of law. *Koner v. Procaccino*, 45 App. Div.2d 551. There are several factors to be considered

Appendix D—Opinion of Special Term of
New York Supreme Court.

in determining whether the activities of the petitioner constitute a profession within the meaning of Subdivision (c) of Section 703 of the Tax Law. In *Rosenbloom v. State Tax Commission*, the Appellate Division listed four such factors: (1) a long-term educational background generally associated with a degree in an advanced field of science or learning; (2) the requirement of a license which indicated sufficient qualifications have been met prior to engaging in the occupation; (3) the control of the occupation by standards of conduct, ethics and malpractice liability; and (4) the barrier to carrying on the occupation as a corporation. 44 App. Div.2d 69. With regard to the fourth consideration, the court noted that it was less significant since New York now permits professionals to incorporate. *Id.* at 71 n. In *Koner v. Procaccino*, the Appellate Division added an additional consideration, *i.e.*, the services performed must involve something more than the type of services generally performed by those in the broader categories of trade, business or occupation.

Based upon previous decisions of the Appellate Division wherein the occupations of marine insurance adjuster and real estate appraisers were denied the status of a profession within the meaning of Subdivision (c) of Section 703 of the Tax Law, the respondent State Tax Commission was not arbitrary or capricious in denying petitioner's application. Compare *Bower v. Bates*, 279 App. Div. 956 with *Adelberg v. Bates*, 278 App. Div. 606 and with *Rosenbloom v. State Tax Commission*, *supra*.

Petition dismissed. Submit judgment.

Dated: Troy, New York,
January 15, 1975.

APPENDIX E**Decision of New York State Tax Commission
Examiner, Decided July 18, 1974****STATE OF NEW YORK
STATE TAX COMMISSION**

In the Matter of the Petition
of
RICHARD J. O'CONNOR

for Redetermination of Deficiency or for Refund of Un-
incorporated Business Tax under Article 23 of the Tax Law
for the Years 1967, 1968, 1969 and 1970.

DECISION

Petitioner, Richard J. O'Connor, has filed a petition for re-determination of deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1967, 1968, 1969 and 1970. (File No. 0-56645263). A formal hearing was held before L. Robert Leisner, Hearing Officer, at the offices of the State Tax Commission, State Office Building, Buffalo, New York, on November 15, 1973, at 9:50 A.M. Petitioner appeared by H. James Abdella, Esq. The Income Tax Bureau appeared by Saul Heckelman, Esq., (James A. Scott, Esq., of counsel).

ISSUE

Did petitioner, Richard J. O'Connor's activities as a claims adjuster during the years 1967, 1968, 1969 and 1970, con-

**Appendix E—Decision of New York State
Tax Commission Examiner.**

stitute the practice of a profession, exempt from the unincorporated business tax?

FINDINGS OF FACT

1. Petitioner, Richard J. O'Connor, and his wife filed New York State income tax resident returns for the years 1967, 1968, 1969 and 1970. He did not file New York State unincorporated business tax returns for said years.

2. On June 26, 1972, the Income Tax Bureau issued a Statement of Audit Changes against petitioner, Richard J. O'Connor, imposing unincorporated business tax upon the income received by him from his activities as a claims adjuster during the years 1967, 1968, 1969 and 1970. In accordance with the aforesaid Statement of Audit Changes, it issued a Notice of Deficiency in the sum of \$3,786.82.

3. Petitioner, Richard J. O'Connor, attended the University of Buffalo for two-and-a-half years. He took night courses in insurance at the Millard Fillmore College at the University of Buffalo. He took a correspondence course through New Amsterdam Casualty Company. From 1949 to 1962, petitioner was an adjuster. Since 1962, he has been licensed by the New York State Insurance Department as an independent claims adjuster.

4. In his activities as an independent claims adjuster during the years 1967, 1968, 1969 and 1970, petitioner, Richard J. O'Connor, received assignments from insurance carriers. Upon receipt of an assignment, he talked to the insured, various claimants and witnesses. Based on his findings,

*Appendix E—Decision of New York State
Tax Commission Examiner.*

petitioner then gave the insurance carrier a factual appraisal of the situation and an opinion as to the carrier's liability. Petitioner's activities required some knowledge of the law, particularly negligence law.

5. Petitioner, Richard J. O'Connor's income as an independent claims adjuster during the years 1967, 1968, 1969 and 1970, was derived solely from personal services rendered. Capital was not a material income producing factor. Petitioner did not advertise, had no employees and had an office in his home for record keeping only.

6. Petitioner, Richard J. O'Connor, contends that in his activities as a claims adjuster, he renders objective opinions to his clients in the same manner as attorneys. He further contends that there is so much similarity between the services of attorneys and his own work that under the equal protection guarantees of the State and Federal constitutions he is entitled to the same exclusion from the unincorporated business tax that is afforded to attorneys and other professionals. Finally, petitioner contends that his exclusion from the category of a professional is arbitrary and represents unreasonable and unfair discrimination without due process of law, in violation of Article 1, section 6 of the New York State Constitution and the Fourteenth Amendment of the U. S. Constitution.

CONCLUSIONS OF LAW

A. That the activities of petitioner, Richard J. O'Connor, as a claims adjuster during the years 1967 through 1970, although requiring special knowledge and experience, did not

*Appendix E—Decision of New York State
Tax Commission Examiner.*

constitute the practice of a profession exempt from the unincorporated business tax under section 703(c) of the Tax Law. *Ottis v. Graves*, 259 A.D. 957, (insurance broker); *Bowser v. Bates*, 279 A.D. 956, (adjuster of marine losses).

B. That the State Tax Commission is without jurisdiction to declare a statute unconstitutional, but is of the belief that the statute in question is neither unconstitutional nor in violation of the "equal protection" clauses of the State and Federal constitutions.

C. That the petition of Richard J. O'Connor is denied, and the Notice of Deficiency issued June 26, 1972, is sustained.

D. Pursuant to the Tax Law, interest shall be added to the amount due until paid.

Dated: Albany, New York,
July 18, 1974.

STATE TAX COMMISSION
(ILLEGIBLE) PROCACCINO,
Commissioner,

(Seal) A. BRUCE MANLEY,
Commissioner,
MILTON KOERNER,
Commissioner.

APPENDIX F

**Regulation Prescribed by New York
State Tax Commission at 20 NYCCR
Section 203.11 (b) (1), pages 263-264**

(b) *Rules and definitions.* To give effect to the foregoing, the following rules and definitions will be applied:

(1) *Other professions defined.* For purposes of this subdivision, the term "other profession" includes any occupation or vocation in which a professed knowledge of some department of science or learning, gained by a prolonged course of specialized instruction and study, is used by its practical application to the affairs of others, either advising, guiding or teaching them, and in serving their interests or welfare in the practice of an art or science founded on it. The word profession implies attainments in professional knowledge as distinguished from mere skill and the application of knowledge to uses for others as a vocation. The performing of services dealing with the conduct of business itself, including the promotion of sales or services of such business and consulting services, does not constitute the practice of a profession even though the services involve the application of a specialized knowledge.

The Tax Commission presently recognizes the following as professions (in addition to the specific professions of law, medicine, dentistry and architecture, previously referred to):

Public Accountancy;	Osteopathy;
Certified Shorthand	Pharmacy;
Reporting;	Physiotherapy;
Chiropody and Podiatry;	Certified Social Work;
Chiropractic;	Veterinary Medicine and
Dental Hygiene;	Surgery;

*Appendix F—Regulation Prescribed by New York
State Tax Commission at 20 NYCCR Section
203.11 (b)(1), pages 263-264.*

Professional Engineering	Psychology;
and Land Surveying;	Landscape Architecture;
Nursing;	Teaching.
Optometry (Ophthalmic	
Dispensing);	

Representations made by or on behalf of other occupations or vocations will be weighed by the Tax Commission when presented. The fact that an occupation has been designated and regulated as a profession under the Education Law will be one of the facts considered in determining whether or not such occupation or vocation constitutes a profession within the intent and meaning of section 703(c) of the Tax Law. Likewise, where the taxpayer represents that he is engaged in a professional occupation which is, or is similar to, an occupation designated as a profession under the Education Law, the compliance with or the failure to comply with the licensing requirements, or any of the other requirements of the Education Law will be one of the facts considered in determining whether or not the taxpayer's activities are in fact professional activities with the intent and meaning of section 703(c) of the Tax Law. Furthermore, the fact that the taxpayer (or, if a partnership, each of the members thereof) has or has not met the educational requirements for licensing under the Education Law would be considered by the Commission in ascertaining whether the taxpayer's activities are the result of knowledge gained by a prolonged course of specialized instruction and study necessary for the practice of the alleged profession.

*Appendix F—Regulation Prescribed by New York
State Tax Commission at 20 NYCCR Section
203.11 (b)(1), pages 263-264.*

Musicians and artists are also recognized as professions by the Tax Commission. However, an activity which, for example, consists of executing drawings or illustrations for commercial advertising purposes, or the production of musical or dramatic shows, or the creation of advertising messages set to music is not a professional activity since it deals with the conduct of business itself.

APPENDIX G

**Letter to Clerk of New York Court
Of Appeals Dated January 6, 1976 and
Reply of the Clerk Dated January 9, 1976**

LAW OFFICES

Johnson, Peterson, Tener & Anderson

January 6, 1976

Mr. Joseph W. Bellacosa
Clerk of the Court
New York State Court of Appeals
Eagle Street
Albany, New York 12207

Re: O'Connor v. State Tax Commission

Dear Mr. Bellacosa:

This is to reply to your letter of December 29, 1975 and the jurisdictional question raised by you.

Although I do not have direct access to Cohen and Karger, *Powers of the New York Court of Appeals* (Rev. ed., 1951), I have reviewed a paraphrase of the key points from that reference described in the commentary to C.P.L.R. 5601 (b)(2), McKinney's *Consolidated Laws of New York Annotated*, p. 499.

Regarding our having raised the question below, beginning with the Appellant's protest to the State Tax Commission, through the hearing before the State Tax Examiner, in brief and in argument at Special Term, Albany County, (Hon.

Appendix G—Letter to Clerk of New York Court of Appeals Dated January 6, 1976 and Reply of the Clerk Dated January 9, 1976.

Justice John T. Casey, presiding), and in brief and in argument before the Appellate Division of the Third Department, the Appellant's constitutional objections have been consistently raised to the professional exemption under the State's unincorporated business tax in Section 703 (c) of the Tax Law.

The sole question contained in Petitioner's brief in the Appellate Division was as follows:

"Pursuant to C.P.L.R. 7803 (3), is the exclusion of the Petitioner-Appellant by the Respondent from the professional exemption to the unincorporated business tax arbitrary and unfair discrimination without due process of law and the denial of the equal protection of the law in violation of the constitutions of the United States and the State of New York?"

As to the substantial nature of Appellant's constitutional question, I respectfully submit that the Court is presented with an extremely timely and important opportunity to remedy a wrong done to this Appellant and many other similarly situated taxpayers in this State and to at the same time provide this State with additional, much needed, revenues. Simply stated as much as possible, Appellant contends that the professional exemption as construed by the State Tax Commission in its regulations is unconstitutional on the grounds of due process and in denial of the equal protection of the laws in view of the recent enactment of laws allowing professionals to incorporate (effective May 19, 1970), when, in fact, the Legislature originally enacted the

Appendix G—Letter to Clerk of New York Court of Appeals Dated January 6, 1976 and Reply of the Clerk Dated January 9, 1976.

professional exemption solely because corporations could not engage in these professions. Therefore, since the State's corporation franchise tax was not then applying to competitors of professionals, the Legislature also exempted professionals from the Unincorporated Business Tax.

The New York State Court of Appeals addressed itself to this question in the leading case of *People ex rel Tower et al v. State Tax Commission* 282 NY 407, 411 26NE2d 955 (1940):

"...The Legislature chose to exempt the professions of the law, medicine, dentistry and architecture for the express reason that under existing law, they cannot be conducted under corporate structure..."

Respondent agreed through its legal counsel in its own Tax Bulletin, 1968 NYTB, V. 1, pp. 57-8, issued January 1, 1969:

"The reason why the Legislature provided that the practice of law, medicine and other professions shall not be subject to the unincorporated business tax was that corporations cannot practice these professions, so that individuals who do practice them are not in competition with corporations which are required to pay a corporate franchise tax."

Among the alternative remedies presented to this Court could very well be a holding of the professional exemption to be unconstitutional, leaving the balance of the tax law in effect, and allowing to Appellant his claim of not being liable for tax up to date but decreeing that hereafter Appellant and all persons similarly situated including all professionals previously

Appendix G—Letter to Clerk of New York Court of Appeals Dated January 6, 1976 and Reply of the Clerk Dated January 9, 1976.

exempted should be liable for the tax. By such an order, no mass refunds need be allowed for other taxpayers on the grounds of public policy involved in the substantial reliance by government on such revenues for budgetary purposes. Such a restricted remedy has been followed in criminal cases before the United States Supreme Court which raised the issue of retroactive application of a statute held unconstitutional. See *Desist v. United States* 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969).

The additional tax revenues available to the State are obviously much needed. Federal revenues from the State would be reduced by the extra tax deduction available at a time when all New York State residents are aware of the disproportion of Federal taxes paid in return for smaller Federal revenues received by the State. An injustice benefitting professionals (including attorneys) in our basically classless society would be removed by the legal system itself at a time when the public is often reckless in its criticism of the legal system and the many excellent judges and lawyers forming its backbone. The foregoing extrajudicial considerations are described for background purposes only in the light of the Court of Appeals requiring a "substantial" constitutional question. These matters are also relevant on the issue of the retrospective application of an unconstitutional statute as discussed by the U.S. Supreme Court in the *Desist* case cited above.

To me, this has been a substantial constitutional question from the first time the issue was presented to me by my client.

Appendix G—Letter to Clerk of New York Court of Appeals Dated January 6, 1976 and Reply of the Clerk Dated January 9, 1976.

I was aware that past court cases were staked against us, but thought and have concluded that no previous case has specifically raised the constitutional issue presented in this case partly because the professional corporation laws have only been recently enacted.

Alternatively, Appellant contends that if the Court is to sustain the statute constitutionally, then in view of that recent professional corporation enactments, it must include Appellant in the professional exemption without regard to any Court precedents. Such a broadening of the professional exemption could be construed by the Court in order to constitutionally sustain the exemption but constitutionally invalidating the Respondent's regulations interpreting them. (Reg. Sec. 203.11 at 1 *CCH N.Y. Tax Reporter*, para. 19-513.) Here again, Appellant contends that the constitutional question is substantial for the reasons cited above.

In conclusion, I took this case primarily because of an element present in it which I believe to be valid—and that is that common sense and the moral side of this case dictate that given the present state of the New York State Business Corporation Law allowing professionals to incorporate and the original cited basis for the professional exemption, it is now unconstitutionally wrong in these United States of America to allow the professional exemption as heretofore interpreted by the Courts and the Respondent.

If the Court wishes to have me appear personally to discuss these matters on the jurisdictional issue, I will do so.

The enclosed copies are for your convenience.

20a

*Appendix G—Letter to Clerk of New York Court of
Appeals Dated January 6, 1976 and Reply of
the Clerk Dated January 9, 1976.*

I assume that my motion set down for January 12, 1976 will be adjourned pending the resolution of the jurisdictional question.

Respectfully submitted,

H. JAMES ABDELLA
H. James Abdella

HJA/bb
Enclosure 10

21a

*Appendix G—Letter to Clerk of New York Court of
Appeals Dated January 6, 1976 and Reply of
the Clerk Dated January 9, 1976.*

STATE OF NEW YORK
COURT OF APPEALS

(Seal)

Joseph W. Bellacosa
Clerk of the Court

Clerks Office
Albany 12207

January 9, 1976

H. James Abdella, Esq.
Johnson, Peterson, Tener & Anderson
Bankers Trust Building
Jamestown, New York 14701

Re: O'Connor v. State Tax Commission

Dear Mr. Abdella:

Thank you for responding to the Court's inquiry in this manner.

Please be advised that this appeal will continue in its normal course and the Court will not act *sua sponte*.

This letter does not represent an adjudication of the subject matter jurisdiction and is without prejudice to a consideration of that question by the Court at the time of oral argument.

Very truly yours,

JOSEPH W. BELLACOSA
Joseph W. Bellacosa

JWB:im

cc: Thomas P. Zolezzi, Esq.,
Assistant Attorney General

Appendix G—Letter to Clerk of New York Court of Appeals Dated January 6, 1976 and Reply of the Clerk Dated January 9, 1976.

STATE OF NEW YORK
COURT OF APPEALS

(Seal)

Joseph W. Bellacosa
Clerk of the Court

Clerk's Office
Albany 12207

January 9, 1976

H. James Abdella, Esq.
Johnson, Peterson, Tener & Anderson
Bankers Trust Building
Jamestown, New York 14701

Re: O'Connor v. State Tax Commission

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Very truly yours,

JOSEPH W. BELLACOSA
Joseph W. Bellacosa

JWB:im

cc: Thomas P. Zolezzi, Esq.,
Assistant Attorney General

APPENDIX H

Excerpts From Public Papers of
New York Governor Herbert H. Lehman,
Second Term 1935, pp. 107-108

UNINCORPORATED BUSINESS TAX

For many years business conducted in this State by individual proprietors and by partnerships has been favored under our tax laws as compared with business conducted under the corporate form of organization. It is proper that the State should impose a tax for the privilege of carrying on business operations under the protection of and within the social and legal framework provided by the State. But the tax should be as broad as business itself and should not be confined to corporate business alone, although as will presently be shown, a somewhat higher rate on corporations is justified. This has long been recognized and, as early as 1922, a report of the Special Joint Committee on Taxation and Retrenchment of Legislature urged that this defect in the State's tax system be repaired by abolishing the personal property tax then levied on unincorporated concerns and imposing upon their net income a business tax similar to the franchise tax on corporations but at a lower rate. That recommendation has since been repeated by every authority who has studied our tax system. Subsequently, the personal property tax was abolished but the unincorporated business tax was not enacted. In my view, it is eminently fair that a business carried on at a profit by a single proprietor or by a group of partners should pay a tax upon its net earnings corresponding to the franchise tax on business corporations.

*Appendix H—Excerpts From Public Papers of New
York Governor Herbert H. Lehman, Second
Term 1935, pp. 107-108.*

As pointed out above, however, the rate should be somewhat lower than the rate of the franchise tax on corporations. This differentiation in rate should be made in recognition of certain advantages which the corporate business enjoys. Corporations have the privilege of limited liability and various other advantages not available to unincorporated competitors. Because of this, the lower rate on unincorporated business is offered as an equitable adjustment.

The establishment of an unincorporated business tax is, in the financial emergency faced by the State, a desirable and logical tax.

Therefore I recommend that:

A temporary emergency tax to be imposed at the rate of 4 per cent for one year (1936) upon the net income in excess of \$5,000 on every unincorporated business (professions excluded). This tax to be based on the earnings of such unincorporated business for the year 1935.

I estimate the yield of such a tax to be \$6,500,000

APPENDIX I

**Report of New York State Commission
for the Revision of the Tax Laws**

EXCERPT FROM NEW YORK
LEGISLATIVE DOCUMENT (1932)
Vol. 18, No. 77, pp. 183-184

Extension of Tax to Unincorporated Business

In states having a personal income tax there is a certain advantage to be gained by doing business in the corporate form, for stockholder A is not taxed on his undistributed profits in the business, whereas partner B or individual owner C is so taxed. Likewise, there are certain advantages to be gained in a business way through the corporate form, the most marked one being that of limited liability. But here it must be recalled that the corporate form is open to all commercial and industrial firms, and if any do not take advantage of it, it must be because for them these advantages are counterbalanced by certain disadvantages. Further, most non-resident ownership interest in business enterprise carried on in New York State is probably in the form of stockholdings rather than in partnership interest or individual ownership. The first and third factors above, and possibly the second, justify heavier taxation of corporate than of non-corporate earnings, but probably not to the extent that exists at present, where corporations pay a 4.5 per cent tax on net income, whereas non-corporate enterprises pay only a loosely-administered tax on stock in trade (personal property tax). Although no state yet taxes non-corporate business on net income it appears logical for New York to take this step, if an artificial advantage in favor of non-corporate enterprise is not to be established

*Appendix I—Report of 1932 New York State Commission
for the Revision of the Tax Laws.*

through the taxing system. Such a change would also permit the abolition of the personal property tax, which has long been recognized as one of the weakest elements, from the points of view both of administration and principle, in the present tax system. In view of what has been said above, the rate should be somewhat lower than the corporate rate, a spread of one per cent being perhaps sufficient.

(G-125)

76-3931

Supreme Court, U. S.
FILED

OCT 13 1976

MICHAEL J. ... CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No.

RICHARD J. O'CONNOR,
Petitioner-Appellant,
against

THE STATE TAX COMMISSION OF THE
STATE OF NEW YORK,
Respondent-Appellee.

BRIEF OF APPELLEE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE
Supreme Court of the United States

October Term 1976

No. 76-393

RICHARD J. O'CONNOR,
Petitioner-Appellant,

against

THE STATE TAX COMMISSION OF THE
STATE OF NEW YORK,
Respondent-Appellee.

**BRIEF OF APPELLEE IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

Statement

Appellee submits this brief in opposition to appellant's petition for a writ of certiorari, on the ground that there is no substantial federal constitutional question involved and accordingly the appellants petition for a writ of certiorari should be denied.

Decisions of the New York Courts in this matter may be found at Misc 2d (unreported, NY Supreme Court,

Albany County Special Term, Part I decided January 15, 1975; affd. 50 AD 2d 675; appeal dismd. no sub. const. quest. 38 NY 2d 937; mot for rearg. den. 39 NY 2d 943.

Statutes and Regulations Involved

New York State Tax Law

"§ 703. Unincorporated business defined

* * *

"(c) Professions—The practice of law, medicine, dentistry or architecture and the practice of any other profession in which capital is not a material income producing factor and in which more than eighty per centum of the unincorporated business gross income for the taxable year is derived from personal services actually rendered by the individual or the members of the partnership or other entity, shall not be deemed an unincorporated business."

20 New York Codes, Rules and Regulations (Department of Taxation and Finance), § 281.4

"281.4 Professions. The Statute, in declaring what shall constitute unincorporated business, excludes certain professions and is limited in its application to other professions.

* * *

"(c) What is a profession? In general, it may be said that a profession includes any occupation or vocation in which a professed knowledge of some department of science or learning is used by its practical application to the affairs of others, either advising, guiding or teaching them, and in serving their interests or welfare in the practice of an art founded on it. The word implies attainment in professional knowledge, as distinguished

from mere skill, and the application of such knowledge to uses for others as a vocation.

"(d) The commission presently recognizes only the following as professions. It will weigh the representations made by or on behalf of other occupations or vocations when presented:

1. accounting;
2. certified shorthand reporting;
3. chiroprody;
4. dental hygiene;
5. engineering;
6. optometry;
7. osteopathy;
8. pharmacy;
9. physiotherapy;
10. teaching;
11. veterinary medicine and surgery;
12. psychology."

New York State Business Corporation Law, § 1501: cited at page 10 of this Brief.

New York State Education Law, Title Eight: cited at page 11 of this Brief.

Statement of Case

The appellant and his wife filed New York State income tax resident returns for the years 1967, 1968, 1969 and 1970 for income received by petitioner during those years for his activities as an independent claims adjuster. The appellant did not file New York State unincorporated business tax returns for those years.

Although the appellant had attended the University of Buffalo for two and a half years and had taken various night

courses and correspondence courses in insurance, he did not have a Bachelor's degree from any university.

From 1949 to 1962 the appellant was an insurance claims adjuster. Since 1962, he has been licensed by the New York State Insurance Department as an independent claims adjuster.

In his activities as an independent claims adjuster, the appellant, who works under the trade name of Chautauqua Claims Service, would be contacted by an insurance agency and would receive assignments from the insurance carriers. Upon receipt of the assignment, the appellant would talk to the insured, to various claimants and to witnesses. Based on his findings, the appellant would give the insurance carrier a factual appraisal of the situation and on opinion as to the carrier's liability.

The appellant's income was derived from personal services and capital was not a material income producing factor. He did not advertise, had no employees and had an office in his home for record keeping purposes.

On June 26, 1972, the New York State Department of Taxation and Finance issued a Statement of Audit Changes against the appellant, imposing unincorporated business tax upon the income tax received by him from his activities as a claims adjuster during the years 1967, 1968, 1969 and 1970. A Notice of Deficiency was issued in the amount of \$3,786.82.

Appellant requested a formal hearing by the New York State Tax Commission for a redetermination of the deficiency. A formal hearing was held on November 15, 1973, at which time evidence was introduced and testimony presented by the appellant to support his contention that he is a professional who is entitled to the professional exemption

from the unincorporated business tax in accordance with the provisions of section 703(c) of the Tax Law.

After reviewing the evidence and testimony presented at the formal hearing, the New York State Tax Commission decided that the appellant was not a professional who is entitled to the exemption from the unincorporated business tax.

Appellant then commenced a proceeding pursuant to Article 78 of the New York State Civil Practice Law and Rules to review the determination of the State Tax Commission.

Supreme Court, Albany County, (Special Term) held that the determination of the New York State Tax Commission was not arbitrary or capricious and confirmed the determination and dismissed the appellant's petition for review. A copy of the order and decision of the Supreme Court is attached as Appendix "A".

Appellant appealed to the New York Appellate Division, Third Department. The Appellate Division by an unanimous decision affirmed the judgment and order of Special Term. A copy of the order and decision of the Appellate Division is attached as Appendix "B".

The appellant then filed a notice of appeal to the New York Court of Appeals as of right pursuant to section 5601(b) of the New York Civil Practice Law and Rules. A copy of the notice of appeal is attached as Appendix "C".

By motion dated January 12, 1976, appellee moved to dismiss the appeal on the ground that there was no substantial constitutional question presented by the appeal. By order dated February 19, 1976, the New York Court of Appeals granted respondent's motion to dismiss upon the ground that no substantial constitutional question is directly involved. A copy of that order is attached as Appendix "D".

Appellant then moved in the Court of Appeals to reargue the motion to dismiss the appeal. The Court of Appeals by order dated June 17, 1976 denied the appellant's motion to reargue. A copy of that order is attached as Appendix "E".

Questions Involved

1. Was the appellant, who was an independent insurance adjuster, entitled to a professional exemption from the unincorporated business tax?
2. Is section 703 of the New York State Tax Law unconstitutional or in violation of the equal protection clauses of the New York State or Federal Constitutions?

The New York State Courts held that the appellant is not entitled to a professional exemption from the unincorporated business tax under section 703(c) of the New York Tax Law. The New York Courts also held that there was no merit in appellants assertion that there is a constitutional violation in the statutory exemption or its application.

Opinions Below

The New York Supreme Court, Special Term, held that the petitioner was not entitled to a professional exemption from the unincorporated business tax. The Appellate Division, Third Department, affirmed the judgment of the Supreme Court holding that the services rendered by the appellant as an independent claims adjuster do not entitle him to a professional exemption under subdivision (c) of section 703 of the New York Tax Law.

The Appellate Division, on the issue of the constitutionality of the application of the statute to the appellant held at 50 New York A D 2d 675 (3d Dept., 1975):

"We find no merit in petitioner's assertions that there is any constitutional violation in the statutory exemption or its application (see *Shapiro v. City of New York*, 32 N Y 2d 96; *People ex rel. Moffet v. Bates*, 276 App. Div. 38)."

The New York State Court of Appeals dismissed the appellants appeal for each of a substantial constitutional question and denied the appellants motion for a rehearing of the dismissal of the appeal.

REASONS FOR DENYING CERTIORARI

A.

The respondent State Tax Commission was correct in determining that the services rendered by the appellant as a claims adjuster do not entitle him to a professional exemption within the intent and meaning of Tax Law, § 703(c).

The basic issue is whether the appellant is exempt from the unincorporated business tax on the grounds that the income involved was derived from the practice of a profession.

"The term 'profession' implies knowledge of an advanced type in a field of science or learning gained by a prolonged course of specialized instruction and study. (*People ex rel. Tower v. State Tax Commission*, 282 N.Y. 407, 412; *Matter of Sundberg v. Bragalini* 7 A D 2d 15, 19, mot. for lv. to app. den. 6 N Y 2d 705; see 20 NYCRR 281.4).

"In determining what activity constitutes the practice of a profession consideration should be given to the following factors: (1) a long-term educational background generally associated with a degree in advanced field of science or learning; (2) the requirements of a license,

which indicates sufficient qualifications have been met prior to engaging in the occupation; (3) the control of the occupation; by standards of conduct, ethics and malpractice liability; and (4) the barrier to carrying on the occupation as a corporation. (*Matter of Rosenbloom v. State Tax Commission* 44 A D 2d 69, 70-71, and see Business Corporation Law § 1501 *et seq.*)” *McMahan v. State Tax Commission*, 45 A D 2d 624 (3d Dept., Sept. 1974).

The appellant does not have a college degree nor is one requisite for the claims adjuster. There is no evidence that there are any colleges and universities offering courses in claims adjusting or that the services rendered by a claims adjuster require knowledge of an advanced type in a given field of science or learning gained by a prolonged course of specialized instruction or study.

As the New York Appellate Division, Third Department, said in *Koner v. Procaccino* and *Peterson v. Procaccino*, 45 New York A D 2d 551:

“Primarily, we are concerned with the intent of the Legislature and, specifically, what was meant by the use of the words ‘the practice of any other profession.’ Several professions are enumerated in subdivision (c) of section 703, namely the practice of law, medicine, dentistry or architecture, and then follows the language, ‘and the practice of any other profession.’ These words must be read in conjunction with the professions listed under the rule of ejusdem generis (McKinney’s Cons. Laws of N.Y., Book 1, Statutes, § 239, subd. b). The words ‘any other’ which follow in line after an enumeration of things or classes are to be regarded as relating to similar things or classes, if the meaning intended is otherwise doubtful. (*Matter of Bowen v. Allen*, 17 A D 2d 12, 14, *affd.* 13 N Y 2d 663.) In our view, to be entitled to an exemption under this statute, in addition to the factors listed in *Rosenbloom*, the services performed must involve something

more than the type of services generally performed by those in the broader categories of a trade, business or occupation (cf. Tax Law § 703, subd. a). The services must also encompass some of the essential characteristics of the preceding enumerated professions. (See *Matter of Freeman*, 34 N Y 2d 1, 7.)”

Although the appellant has taken courses in insurance and business law which the appellant has specifically stated were not required by the insurance companies, and by virtue of his study and experience is able to assist insurance companies in settling a case, the mere fact that he is an expert in adjusting claims does not mean that he is practicing a profession. (*Matter of Sheehan v. Murphy*, 12 New York A D 2d 713 [3d Dept., 1960].)

As the New York Appellate Division, Third Department, said in *Traub v. Goodrich*, 286 New York App. Div. 927:

“Concededly, petitioner’s activities require specialized skill and technical knowledge but his status does not require ‘knowledge of an advanced type in a given field of science or learning gained by a prolonged course of specialized instruction and study’ which is essential to the term ‘professional’ as used in the statute. (*People ex rel. Tower v. State Tax Commission*, 282 N.Y. 407, 412.)”

The appellant is engaged in the business of supplying facts and information along with his personal opinions to insurance carriers in order to assist them in settling a case. This appellant sells his services to a nonprofessional insurance company. His activities constitute the carrying on of a business rather than the practice of a profession. *Koner v. Procaccino* (*supra*). The appellant has not established that he comes within section 703(c) of the New York Tax Law and has expressed in *Matter of Schmidt v. Bates* (282 New York App. Div. 980), a professional exemption should not be extended to new categories.

As a claims adjuster, the appellant is a valuation expert. Three cases in which it was decided by the New York Courts that valuation experts are not entitled to a professional exemption are: *Matter of Bowser v. Bates*, 279 New York App. Div. 956 (3d Dept., 1952); *Matter of Adelsberg v. Bates*, 278 New York App. Div. 606 (3d Dept., 1951); and *Matter of Rosenbloom v. State Tax Commission*, 44 New York A D 2d 69 (3d Dept., 1974). In *Matter of Bowser v. Bates*, *supra*, the New York Appellate Division, Third Department, held that the petitioner there, who was an insurance adjuster who established marine losses, was not practicing a profession and was not entitled to an exemption from the unincorporated business tax. In the *Bowser* case, the Court said at 279 New York App. Div. 956:

"Petitioner's occupation may be somewhat unique but the commission could well find it did not rise to the dignity of a profession within the authorities on the subject
• • •"

In both *Adelsberg* and *Rosenbloom*, the petitioners were real estate appraisers (valuation experts in land) and in both cases, the New York Appellate Division held that the petitioners were not practicing a profession.

Appellant goes to great length in his contention that since professionals may incorporate under the New York State Business Corporation Law, professionals are no longer in need of an exemption from the unincorporated business tax. Appellant contends that he is a professional and that thus should be exempt from the unincorporated business tax.

It is submitted that the appellant would not even qualify as a professional under the provisions of Article 15 of The New York State Business Corporation Law.

Section 1501 of the New York State Business Corporation Law reads in part:

"§ 1501. Definitions

• • •

"(b) 'Profession' includes any practice as an attorney and counselor-at-law, or as a licensed physician, and those occupations designated in title eight of the education law."

Title eight of the New York State Education Law does not list a licensed adjuster as a profession. The only professions listed under Title eight of the New York State Education Law are as follows:

Medicine
Physical Therapy
Physician's associates and specialist's assistants
Chiropractic
Practice of Massage
Dentistry and dental hygiene
Veterinary medicine
Pharmacy
Nursing
Podiatry
Optometry
Ophthalmic dispensing
Engineering and land surveying
Architecture
Landscape architecture
Public accountancy
Shorthand reporting
Psychology
Social Work
Massage
Speech Pathologists and Audiologists.

It is submitted that the appellant did not establish that he is a professional who is entitled to the exemption from the unincorporated business tax.

B.

The unincorporated business tax, as applied to the appellant is not arbitrary, discriminatory or unfair. It does not violate the appellant's rights under the due process or equal protection clauses of the State or Federal Constitutions.

The appellant contends that in his activities as a claims adjuster, he renders objective opinions to his clients in the same manner as attorneys. He contends that his work is so similar to an attorney's work that if he is denied the same exemption from the unincorporated business tax as attorneys, he is being denied equal protection of the law.

It is submitted that the appellant's activities are not the same as an attorney's. He does not have a law degree, nor is he licensed to practice as an attorney. He does not and may not draw contracts; he does not and may not argue or try cases in the courts. He does not and may not prepare release forms. He only fills in the blanks on forms that have been prepared by attorneys.

It is submitted that there is no merit in appellant's contention that to exclude him from exemption granted to lawyers violates the equal protection clause of the Fourteenth Amendment of the United States Constitution or Article 1, Section 6 of the New York State Constitution. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356; *Shapiro v. City of New York*, 32 N Y 2d 96 (1973), appeal dismissed for want of a substantial federal question, 414 U.S. 804, reh'g. den. 414 U.S. 1087.

As was stated by the New York Court of Appeals in *Shapiro v. City of New York*, *supra*, a case which dealt with the unincorporated business tax exemption as applied to professionals:

"Due Process Claim"

"There can be no doubt that the tax law with which we are concerned was enacted solely and simply as an exercise of the taxing power; it was not motivated by any purpose other than the raising of revenue. 'This being so, the due process clause may not here be availed of to condemn the statute. That clause, it has been said, "is applicable to a taxing statute * * * only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property.'" (*Magnano Co. v. Hamilton*, 292 U.S. 40, 44.)' (*Ampco Print.-Advs. Corp. v. City of New York*, 14 N Y 2d 11, 24, app. dsmd. for want of a substantial Federal question, 379 U.S. 5; see *Lehnhausen v. Lake Shore Auto Parts Co.*, U.S., 41 U. S. Law Week 4289, 4290 [decided Feb. 22, 1973].)"

As to the appellant's contention that he is being denied equal protection under the laws, *Shapiro (supra)*, went on to say:

"Equal Protection Claims"

"So far as the plaintiffs equal protection claims are concerned, the governing principles are familiar and well settled. The rule is elementary that 'in taxation, even more than in other fields, legislatures possess the greatest freedom in classification.' *Madden v. Kentucky*, 309 U.S. 83, 88; see, also, e.g., *Lehnhausen v. Lake Shore Auto Parts Co.*, U.S., U.S. Law Week 4289, 4290-4292 [decided Feb. 22, 1973], *supra*; *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526-528; *Walters v. City of St. Louis*, 347 U.S. 231, 237-238; *Wisconsin v. J. C. Penny Co.*, 311 U.S. 435, 445; *Lawrence v. State Tax Comm.*, 286 U.S. 276, 283; *Matter of Roosevelt Raceway v. County of Nassau*, 18 N Y 2d 30, 39, app. dsmd. for want of a substantial Federal question, 385 U.S. 453; *Ampco Print.-*

Adv. Corp. v. City of New York, 14 N Y 2d 11, 24, *supra*.) As the Supreme Court observed, just about four weeks ago, in the *Lehnhausen* case (.... U.S., 41 U.S. Law Week 4289, 4290, *supra*), 'Where taxation is concerned and no specific federal right, apart from equal protection, is imperilled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation. As stated in *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526-527: "The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guarantees of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of exercise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value." ' "

It is submitted that the appellant does not qualify as a professional and his rights under the due process clause and the equal protection clause of the State and Federal Constitutions are not being violated.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: Albany, New York,
October 6, 1976.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent

RUTH KESSLER TOCH
Solicitor General of the
State of New York

THOMAS P. ZOLEZZI
Assistant Attorney General of
the State of New York

of Counsel

APPENDIX A.

Order and Decision of the Supreme Court.

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Albany, at the Courthouse in the City of Albany, New York, on the 13th day of December, 1974.

Present: HONORABLE JOHN T. CASEY,
Justice Presiding.

—○—
In the Matter of the Application
of

RICHARD J. O'CONNOR,

Petitioner,

against

THE STATE TAX COMMISSION OF THE STATE
OF NEW YORK,

Respondent,

To review a determination made after a hearing in the matter of Unincorporated Business Taxes Under Article 23 of the Tax Law for the years 1967, 1968, 1969 and 1970.

—
Index No.
—○—

The petitioner commenced a proceeding pursuant to Article 78 of the Civil Practice Law and Rules to review a determination of the State Tax Commission which sustained unincorporated business tax assessments imposed under Article 23 of the Tax Law.

Appendix A—Order and Decision of the Supreme Court.

Now, after reading and filing the notice of petition dated the 30th day of October, 1974, the petition of Johnson, Peterson, Tener and Anderson (H. James Abdella, of counsel), counsel for the petitioner, in support of the proceeding, dated the 30th day of October 1974, and upon reading and filing the answer and return of the respondent sworn to on the 26th day of November 1974, by Saul Heckelman, counsel to the State Tax Commission, and after hearing Johnson, Peterson, Tener and Anderson (H. James Abdella, Esq.), of counsel in support of the petition, and Louis J. Lefkowitz, Attorney General of the State of New York (Thomas P. Zolezzi, Assistant Attorney General), of counsel for the respondent in opposition to petitioner's petition, and due deliberation having been had, and the Court having rendered a decision in writing dated the 15th day of January, 1975, a copy of which is attached to and made a part of this order;

Now, on the motion of Louis J. Lefkowitz, Attorney General of the State of New York, it is

ORDERED that the determination be and is hereby confirmed and it is further

ORDERED that the petition be and is hereby dismissed without costs.

Dated: January 22, 1975,
Troy, New York.

ENTER

(Seal)

/s/ JOHN T. CASEY,
Justice of the Supreme Court.

Appendix A—Order and Decision of the Supreme Court.

State of New York,
 County of Albany Clerk's Office } ss.:
 No. 3898

I, JAMES J. COYNE, JR., Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, DO HEREBY CERTIFY that I have compared the annexed copy order with the original thereof filed in this office on the 28 day of Jan. 1975 and that the same is a correct transcript therefrom, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my name and affixed my official seal, this 28 day of Jan. 1975.

(Seal) JAMES J. COYNE, JR.,
 Clerk.

*Appendix A—Order and Decision of the Supreme Court.***Memorandum.**

STATE OF NEW YORK

SUPREME COURT—County of Albany

—o—

In the Matter of the Application
 of

RICHARD J. O'CONNOR,

Petitioner,

against

THE STATE TAX COMMISSION OF THE STATE
 OF NEW YORK,

Respondent.

To review a determination made after a hearing in the matter of Unincorporated Business Taxes Under Article 23 of the Tax Law for the years 1967, 1968, 1969 and 1970.

—o—

(Supreme Court, Special Term, Albany County,
 December 13, 1974)
 (Justice John T. Casey, Presiding)

Appearances:

Johnson, Peterson, Tener & Anderson, Esqs., H. James Abdella, Esq., Of Counsel, Attorneys for Petitioner, Bankers Trust Building, Jamestown, New York 14701.

Hon. Louis J. Lefkowitz, Attorney General, Attorney for Respondent, Thomas P. Zolezzi, Esq., Of Counsel, The Capitol, Albany, New York 12224.

Appendix A—Order and Decision of the Supreme Court.

CASEY, J.

This is a proceeding pursuant to Article 78 of the CPLR to review a determination of the State Tax Commission, which sustained unincorporated business tax assessments imposed under Article 23 of the Tax Law.

The petitioner was assessed unincorporated business tax liability upon income derived from his activities as an independent claims adjuster. The facts as developed in a formal hearing before a hearing officer designated by the State Tax Commission are undisputed.

The petitioner is a high school graduate and attended the University of Buffalo for two and one-half years. Subsequently, he took all the insurance night courses at the Millard Fillmore College at the University of Buffalo and various correspondence courses through New Amsterdam Casualty Company. From 1949 to 1962 he was an adjuster. In 1962, the petitioner obtained an independent adjuster's license from the New York State Department of Insurance. As an independent adjuster he would be contacted by an insurance agency and given an assignment. Upon receipt of the assignment, he would contact the insured and obtain a statement from him; petitioner would also contact various witnesses. Upon completion of those procedures, the petitioner would issue a written report to the insurance carrier stating his opinion as to the liability of the carrier.

The issue presented is one of law. *Koner v. Procaccino*, 45 App. Div.2d 551. There are several factors to be considered in determining whether the activities of the petitioner constitute a profession within the meaning of Subdivision (c) of Section 703 of the Tax Law. In *Rosenbloom v. State Tax Com-*

Appendix A—Order and Decision of the Supreme Court.

mission, the Appellate Division listed four such factors: (1) a long-term educational background generally associated with a degree in an advanced field of science or learning; (2) the requirement of a license which indicated sufficient qualifications have been met prior to engaging in the occupation; (3) the control of the occupation by standards of conduct, ethics and malpractice liability; and (4) the barrier to carrying on the occupation as a corporation. 44 App. Div.2d 69. With regard to the fourth consideration, the court noted that it was less significant since New York now permits professionals to incorporate. *Id.* at 71 n. In *Koner v. Procaccino*, the Appellate Division added an additional consideration, i.e., the services performed must involve something more than the type of services generally performed by those in the broader categories of trade, business or occupation.

Based upon previous decisions of the Appellate Division wherein the occupations of marine insurance adjuster and real estate appraisers were denied the status of a profession within the meaning of Subdivision (c) of Section 703 of the Tax Law, the respondent State Tax Commission was not arbitrary or capricious in denying petitioner's application. Compare *Bower v. Bates*, 279 App. Div. 956 with *Adelberg v. Bates*, 278 App. Div. 606 and with *Rosenbloom v. State Tax Commission*, *supra*.

Petition dismissed. Submit judgment.

Dated: Troy, New York,
January 15, 1975.

APPENDIX B.

Order and Decision of the
Appellate Division.

At a Term of the Appellate Division of the Supreme Court in and for the Third Judicial Department held at the Empire State Plaza Justice Building in the City of Albany, New York, commencing on the 20th day of October, 1975.

Present:

Hon. Louis M. Greenblott, *Justice Presiding*,
Hon. Michael E. Sweeney,
Hon. Harold E. Koreman,
Hon. Robert G. Main,
Hon. Walter B. Reynolds, *Associate Justices*.

—o—
In the Matter of the Application
of
RICHARD J. O'CONNOR,

Appellant,

against

THE STATE TAX COMMISSION OF THE
STATE OF NEW YORK,

Respondent.

To review a determination made after a hearing in the Matter of Unincorporated Business Taxes Under Article 23 of the Tax Law for the years 1967, 1968, 1969 and 1970.

—
No. 26082
—o—

Appendix B—Order and Decision of the Appellate Division.

The appellant having appealed from a judgment of the Supreme Court at Special Term, entered in the office of the Clerk of Albany County on January 28, 1975 which dismissed petitioner's application, in a proceeding pursuant to CPLR Article 78, and confirmed a determination of the State Tax Commission sustaining unincorporated business tax assessments imposed under Article 23 of the Tax Law; and said appeal having been presented during the above-stated Term of this Court and having been argued by Johnson, Peterson, Tener and Anderson (H. James Abdella, Esq.), of counsel for the appellant, and Thomas P. Zolezzi, Esq., Assistant Attorney General, of counsel for respondent, and, after due deliberation, the Court having rendered a decision on the 20th day of November, 1975, it is hereby

ORDERED, that the judgment be and the same is hereby affirmed, without costs.

ENTER:

/s/ JOHN J. O'BRIEN,
Clerk.

Dated and Entered: November 24, 1975.

A true copy:

(Seal) JOHN J. O'BRIEN,
Clerk.
—

*Appendix B—Order and Decision of the Appellate Division.*SUPREME COURT—Appellate Division
Third Judicial Department

November 20, 1975

— o —

In the Matter
of
RICHARD J. O'CONNOR,
Appellant,

v.

STATE TAX COMMISSION,
Respondent.

—

26082

— o —

Appeal from a judgment of the Supreme Court at Special Term, entered January 28, 1975 in Albany County, which dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, and confirmed a determination of the State Tax Commission sustaining unincorporated business tax assessments imposed under article 23 of the Tax Law.

We agree with the court's decision confirming the determination of the respondent that the services rendered by petitioner as an independent claims adjuster do not entitle him to a professional exemption under subdivision (c) of section 703 of the Tax Law (*People ex rel. Tower v. State Tax Commission*, 282 N.Y. 407; *Matter of Koner v. Procaccino*, 45

Appendix C—Notice of Appeal.

A D 2d 551; *Matter of Rosenbloom v. State Tax Comm.*, 44 A D 2d 69). On this record, such a finding is not arbitrary or capricious. We find no merit in petitioner's assertions that there is any constitutional violation in the statutory exemption or its application (see *Shapiro v. City of New York*, 32 N Y 2d 96; *People ex rel. Moffet v. Bates*, 276 App. Div. 38).

Judgment affirmed, without costs.

Greenblott, J. P., Sweeney, Koreman, Main and Reynolds, JJ., concur.

APPENDIX C.**Notice of Appeal.**STATE OF NEW YORK
Appellate Division—Third Department

— o —

In the Matter of the Application
of
RICHARD J. O'CONNOR,

Appellant,

v.

THE STATE TAX COMMISSION OF THE
STATE OF NEW YORK,

Respondent.

—

Index No. 26082

— o —

PLEASE TAKE NOTICE, that the above-named Appellant hereby appeals to the Court of Appeals from the Order of the

Appendix C—Notice of Appeal.

Appellate Division, Third Department, duly entered on November 24, 1975, which Order affirms the judgment of the Supreme Court at Special Term entered January 28, 1975 in Albany County, which dismissed Petitioner-Appellant's application pursuant to CPLR Article 73 for annulment of Respondent's deficiency assessment for unincorporated business taxes for the years 1967, 1968, 1969 and 1970.

Dated: December 19, 1975.

JOHNSON, PETERSON, TENER
& ANDERSON,
(H. James Abdella, Esq.,
of counsel),
Attorneys for Appellant-Petitioner,
Bankers Trust Building,
Jamestown, New York 14701,
Phone (716) 664-5210.

To:

Mr. Thomas P. Zolezzi,
Attorney for Respondent,
Assistant Attorney General,
New York State Department of Law,
Albany, New York 12224.

APPENDIX D.

Order Dated February 19, 1976.

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the nineteenth day of February A. D. 1976.

Present: Hon. Charles D. Breitell,
Chief Judge, presiding.

—————○—————
In the Matter of the Application
of
RICHARD J. O'CONNOR,

Appellant.

vs.

THE STATE TAX COMMISSION OF THE
STATE OF NEW YORK,

Respondent.

—————
Mo. No. 64
—————○—————

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

Appendix D—Order Dated February 19, 1976.

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

(Seal) JOSEPH W. BELLACOSA,
Joseph W. Bellacosa,
Clerk of the Court.

APPENDIX E.**Order Dated June 17, 1976.**

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventeenth day of June A. D. 1976.

Present: Hon. Charles D. Breitell,
Chief Judge, presiding.

—————o—————
In the Matter of the Application
of
RICHARD J. O'CONNOR,

Appellant,

vs.

THE STATE TAX COMMISSION OF THE
STATE OF NEW YORK,

Respondent.

—————
Mo. No. 612
—————o—————

A motion for reargument of a motion to dismiss the appeal in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

(Seal) JOSEPH W. BELLACOSA,
Joseph W. Bellacosa,
Clerk of the Court.